

**PROFESSIONAL SERVICES AGREEMENT
ARCHITECTURAL/ENGINEERING SERVICES**

STATE OF TEXAS

COUNTY OF BEXAR

CITY OF SAN ANTONIO

AGREEMENT FOR ARCHITECTURAL/ENGINEERING SERVICES

PROJECT NAME – PROJECT NUMBER

This Agreement is made and entered into in San Antonio, Bexar County, Texas; between the City of San Antonio, a Municipal Corporation in the State of Texas, hereinafter termed "CITY" and

CONSULTANT NAME AND ADDRESS

Architect(s)/Engineer(s), duly licensed, and practicing under the laws of the State of Texas, hereinafter termed "DESIGN CONSULTANT", said Agreement being executed by the CITY pursuant to the City Charter, Ordinances, and Resolutions of the City Council, and by the DESIGN CONSULTANT for architectural and/or engineering services hereinafter set forth in connection with the above designated Project for the City of San Antonio.

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ARTICLE I. DEFINITIONS

As used in this AGREEMENT, the following terms shall have meanings as set out below:

- 1.1 "Application for Compensation" means written form for a request from DESIGN CONSULTANT or Construction Contractor to be paid for completed work.
- 1.2 "Application for Payment" means form CONSTRUCTION CONTRACTOR uses to make a request to be paid for completed work.
- 1.3 "Certificate for Payment" means a form DESIGN CONSULTANT uses to make recommendations on Construction Contractor's Application for Payment.
- 1.4 "CITY" and "Owner" means the City of San Antonio, Texas.
- 1.5 "Claim" is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the Agreement terms, payment of money, extension of time or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between the Owner and DESIGN CONSULTANT arising out of or relating to the Agreement.
- 1.6 "Compensation" means amounts paid by City to DESIGN CONSULTANT for completed services under this Agreement.
- 1.7 "CONSTRUCTION CONTRACTOR" means the firm hired by the CITY to construct the Project.
- 1.8 "Construction Contract Documents" means the contract between the CITY and the firm contracted by CITY to construct the project and all documents therein.
- 1.9 "Contract Drawings and Specifications" means the construction documents.
- 1.10 "DESIGN CONSULTANT" means the **ARCHITECT/ENGINEER** and its officers, partners, employees, agents and representatives, and all sub-consultants, if any, and all other persons or entities for which the DESIGN CONSULTANT is legally responsible.
- 1.11 "Director" means the Director of CITY's Capital Improvements Management Services Department, Public Works Department or the designated project manager identified by the Notice to Proceed.
- 1.12 "Final Compensation" means the final amounts paid by CITY to DESIGN CONSULTANT for completed services under this Agreement.
- 1.13 "Final Payment" means the final amounts paid by CITY to CONSTRUCTION CONTRACTOR for completed work under the construction contract.
- 1.14 "Owner Designated Representative (ODR)" means person designated by Owner to act for Owner.

- 1.15 "Project" means the capital improvement/construction development undertaking of CITY for which DESIGN CONSULTANT's services, as stated in the Scope of Services, are to be provided pursuant to this AGREEMENT.
- 1.16 "Payment" means amounts paid by City to Construction Contractor for work performed under construction contract documents.
- 1.17 "Proposal" means Design Consultant's Proposal to provide services for this Project.
- 1.18 "Request for Payment" means a form the Construction Contractor uses to be paid for completed work.
- 1.19 "Schedule of Values" means the values allocated to materials and various portions of the work, prepared in such form, and supported by such data to substantiate its accuracy as Owner may require.
- 1.20 "Scope of Services" mean the services described in Article IV Scope of Services.
- 1.21 "Services" means design services performed by the DESIGN CONSULTANT.
- 1.22 "Statement of Probable Construction Cost" means DESIGN CONSULTANT's estimate of probable Construction costs based on current, area, volume or other unit costs.
- 1.23 "Substantial Completion" is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.
- 1.24 "Total Compensation" means the lump sum amount of this Agreement.
- 1.25 "Work" means the construction performed by the Construction Contractor and design services performed by the DESIGN CONSULTANT.

ARTICLE II. COMPENSATION

- 2.1 The Total Compensation for all services defined by this Agreement is the lump sum of **AMOUNT IN DOLLARS (\$XXXXXXX)**. It is agreed and understood that such amount will constitute full compensation to the DESIGN CONSULTANT. Such amount has been approved and appropriated by the San Antonio City Council for expenditure under this Agreement. Unless and until the CITY makes further appropriations for any services not included in the Scope of Services of this Agreement, the obligation of the CITY to the DESIGN CONSULTANT for Total Compensation in connection with this Agreement cannot and will not exceed such sum of **\$XXXXXXX** without further amendment to this Agreement.
- 2.1.1 The amount to be paid to the DESIGN CONSULTANT is stated in this Agreement and, including authorized adjustments, is the total amount payable by the Owner to the DESIGN CONSULTANT for performance of the Work under the Agreement Documents.
- 2.2 A Schedule of Values shall be used as the basis for reviewing the DESIGN CONSULTANT's Applications for Payment. The Schedule of Values shall include a schedule for both the design phase and construction phase of the project.
- 2.2.1 Before the first Application for Payment, the Owner shall receive from the DESIGN CONSULTANT a Schedule of Values allocated to the Phases in Paragraph 2.2.3 prepared

in such form and supported by such data to substantiate its accuracy as the Owner may require. This Schedule of Values shall be used as the basis for reviewing the DESIGN CONSULTANT's Applications for Payment during each phase of the Work.

- 2.2.2 Before the first Application for Payment during the construction phase, the DESIGN CONSULTANT shall receive from the Construction Contractor a draw schedule allocated to various portions of the Work prepared in such form and supported by such data to substantiate accuracy as the DESIGN CONSULTANT may require. This schedule shall be used as the basis for reviewing the DESIGN CONSULTANT'S Applications for Payment during the construction phase.
- 2.2.3 DESIGN CONSULTANT shall complete the PROJECT in accordance with the following Project Design Phases:

<u>PHASE</u>	<u>PERCENT OF TOTAL FEE</u>
Schematic Design Phase	___%
Design Development Phase	___%
Construction Documents	___%
Construction Phase	___%

- 2.3 The DESIGN CONSULTANT shall submit an itemized Application for Compensation for work completed in accordance with the Schedule of Values. Such Application for Payment shall be notarized, if required, and supported by such data substantiating the DESIGN CONSULTANT's right to Compensation as the Owner may require. Such Application for Payment shall be used to substantiate the DESIGN CONSULTANT's right to compensation from the Owner.
 - 2.3.1 Such applications may include Applications for Compensation on account of changes in the Work which have been properly authorized by the Director, or by interim determination approved by the Director, but not yet included in Amendments to this Agreement.
 - 2.3.2 The DESIGN CONSULTANT and the CITY acknowledge the fact that the Total Fee amount contained in paragraph 2.1 above has been established predicated upon the total estimated costs of services to be rendered under this Agreement. For additional services or if the scope of services is changed materially, compensation shall be in accordance with EXHIBIT 2 "Compensation for Additional Professional Services."
 - 2.3.3 The DESIGN CONSULTANT shall, within ten (10) days following receipt of Compensation from the Owner, pay all bills for services performed and furnished by others in connection with the Project and the performance of the work, and shall, if requested, provide the Owner with evidence of such payment. DESIGN CONSULTANT's failure to make payments within such time shall constitute a material breach of this Agreement, unless the DESIGN CONSULTANT is able to demonstrate to Owner bona fide disputes associated with the unpaid subconsultant and its work. DESIGN CONSULTANT shall include a provision in each of its subagreements imposing the same payment obligations on the subconsultant's as are applicable to the DESIGN CONSULTANT hereunder, and if the Owner so requests, shall provide copies of such payments by the DESIGN CONSULTANT to the Owner. If the DESIGN CONSULTANT has failed to make payment promptly to the subconsultant for the Work for which the Owner has made payment to the DESIGN CONSULTANT, the Owner shall be entitled to withhold payment to the DESIGN CONSULTANT to the extent necessary to protect the Owner.
 - 2.3.4 The DESIGN CONSULTANT warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The DESIGN CONSULTANT further warrants that upon submittal of an Application for Compensation, all Work for which Applications for Application have been previously issued and payments

received from the Owner shall, to the best of the DESIGN CONSULTANT's knowledge, information and belief be free and clear of liens, claims, security interests or encumbrance in favor of the DESIGN CONSULTANT, or other persons or entities making a claim by reason of having provided labor or services relating to the Work. **DESIGN CONSULTANT SHALL INDEMNIFY AND HOLD OWNER HARMLESS FROM ANY LIENS, CLAIMS, SECURITY INTEREST OR ENCUMBRANCES FILED BY ANYONE CLAIMING BY, THROUGH OR UNDER THE ITEMS COVERED BY PAYMENTS MADE BY THE OWNER TO DESIGN CONSULTANT.**

ARTICLE III. METHOD OF PAYMENT

- 3.1 DESIGN CONSULTANT may submit a request for Partial Compensation prior to submittal of a Request for Compensation in this Article. A request for Partial Compensation must be accompanied by a progress report detailing the Work performed. Any partial payment made shall be in proportion to the Work performed as reflected in the progress report and approved by the Director. Partial Compensation shall not exceed seventy percent (70%) of the compensation allowed for the Phase in which the Partial Compensation is requested. The balance due for the Phase in which Partial Compensation is approved will be paid to DESIGN CONSULTANT upon approval and acceptance of the Phase.
- 3.2 Compensation may be made to the DESIGN CONSULTANT based upon the several phases as described in Article II and in accordance with and subject to the following:
- 3.2.1 Preliminary/Schematic Design Phase – [REDACTED]% of the total amount due the DESIGN CONSULTANT under the Preliminary/Schematic Design Phase shall be payable after approval and acceptance of this Phase by the CITY.
- 3.2.2 Design Development Phase – [REDACTED]% the total amount due the DESIGN CONSULTANT under the Design Development Phase shall be payable after approval and acceptance of this Phase by the CITY.
- 3.2.3 Construction and Bid Documents Phase – [REDACTED]% of the total amount due the DESIGN CONSULTANT under the Construction and Bid Documents Phase shall be payable after the bid opening provided the low qualified bid is in conformance with Section II of the Agreement.
- 3.2.4 Construction Phase - [REDACTED]% of the total fee due DESIGN CONSULTANT during the Construction Phase will be made in monthly installments for this Phase in proportion to the percentage of construction completed by the CONSTRUCTION CONTRACTOR as determined by the Director in his sole discretion.
- 3.2.5 Project Close Out and Final Payment:
- a. The DESIGN CONSULTANT shall not be entitled to final payment unless and until it submits to the Owner its affidavit that the invoices for services, and other liabilities connected with the Work for which the Owner, or the Owner's property, might be responsible have been fully paid or otherwise satisfied or will be paid from final payment; releases and waivers of liens from all the DESIGN CONSULTANT's subconsultants and of any and all other parties required by the Owner that are either unconditional or conditional on receipt of final payment, Certificates of insurance showing continuation of required insurance coverages; such other documents as Owner may request; and consent of Surety to final payment.
- b. Final Payment - The final payment to be made by the CITY to the DESIGN CONSULTANT will be payable upon submission of the "Record Drawings". DESIGN CONSULTANT agrees to submit "Record Drawings" in print media,

electronic format (PDF format) and final billing within 45 days of final acceptance of construction. Additionally, DESIGN CONSULTANT agrees to submit a statement of release with the final billing notifying the CITY that there are no further payments owed to the DESIGN CONSULTANT by the CITY beyond the final bill, Final billing shall indicate "Final Bill - no additional payments are due to DESIGN CONSULTANT".

- 3.2.6 When all of the Work is finally completed and ready for final inspection, the DESIGN CONSULTANT shall notify the Owner thereof in writing. Thereupon, the DESIGN CONSULTANT and Owner will make final inspection of the Work and, if the Work is complete in full accordance with this Agreement and this Agreement has been fully performed, the DESIGN CONSULTANT will promptly issue a final Certificate for Payment certifying to the Owner that the Project is complete and that the DESIGN CONSULTANT is entitled to the remainder of the unpaid Agreement Sum, less any amount withheld pursuant to this Agreement. If the DESIGN CONSULTANT is unable to issue its final Certificate of Payment for reasons for which the DESIGN CONSULTANT is responsible and is required to repeat its final inspection of the Work, the DESIGN CONSULTANT shall bear the cost of such repeat final inspection(s).
- 3.2.7 The Owner may withhold payment to such extent as may be necessary, in the Owner's opinion, to protect the Owner from damage or loss for which the DESIGN CONSULTANT is responsible, because of:
 - 3.2.7.1 delays in the performance of the DESIGN CONSULTANT's work;
 - 3.2.7.2 third party claims filed or reasonable evidence indicating probable filing of such claims unless security acceptable to the Owner is provided by the DESIGN CONSULTANT;
 - 3.2.7.3 failure of the DESIGN CONSULTANT to make payments properly to sub-consultants or vendors for labor, materials or equipment;
 - 3.2.7.4 reasonable evidence that the DESIGN CONSULTANT's work cannot be completed for the amount unpaid under this Agreement;
 - 3.2.7.5 damage to the Owner or the CONSTRUCTION CONTRACTOR; or
 - 3.2.7.6 persistent failure by the DESIGN CONSULTANT to carry out the performance of its services in accordance with this Agreement.
- 3.2.8 When the above reasons for withholding are removed or remedied by the DESIGN CONSULTANT, payment of the amount withheld will be made within a reasonable time. The Owner shall not be deemed in default by reason of withholding payment as provided for in this Article.
- 3.2.9 In the event of any dispute(s) between the parties regarding the amount properly payable for any Phase or as final payment, or regarding any amount that may be withheld by the Owner, the DESIGN CONSULTANT shall be required to make a claim pursuant to and in accordance with the terms of this Agreement and follow the procedures provided herein for the resolution of such dispute. In the event DESIGN CONSULTANT does not initiate and follow the claims procedures provided in this Agreement in a timely manner and as required by the terms thereof, any such claim shall be waived.

- 3.2.10 The Owner shall make final payment or all sums due the DESIGN CONSULTANT not more than thirty (30) days after the DESIGN CONSULTANT has submitted the final Basic Services Pay Estimate and all Additional Services Pay Estimates and has verified the construction and Texas Department of Licensing & Regulation punch lists are complete, and that the PDF as-builts, and CADD site plan (unsealed) are submitted and accepted by the CITY.
- 3.2.11 Acceptance of final payment by the DESIGN CONSULTANT shall constitute a waiver of claims except those previously made in writing and identified by DESIGN CONSULTANT as unsettled at the time of final Application for Payment.
- 3.2.12 DESIGN CONSULTANT agrees to maintain adequate books, payrolls and records satisfactory to the Owner in connection with any and all Work performed hereunder. DESIGN CONSULTANT agrees to retain all such books, payrolls and records (including data stored in computer) for a period of not less than four (4) years after completion of Work. At all reasonable times, Owner and its duly authorized representatives shall have access to all personnel of DESIGN CONSULTANT and the Construction Contractor and all such books, payrolls and records, and shall have the right to audit same.
- 3.3 Internet-based Project Management Systems. Owner will administer its design and construction management through an Internet-Based Management System. In such case, the DESIGN CONSULTANT shall conduct communication through this media and perform all Project related functions utilizing this database system. This includes correspondence, submittals, requests for information, vouchers, or payment requests and processing, amendment, change orders and other administrative activities. The Owner shall administer the software, shall provide training to Project Team Members, and shall make the software accessible via the Internet to all Project Team Members.
- 3.4 All draws shall be submitted through the CITY's Program Management Portal. Prior to submittal of the first draw, DESIGN CONSULTANT will submit a schedule of values for payment to be approved by the CITY, which approval shall not be unreasonably withheld, conditioned or delayed. Any changes to the schedule of values once approved will be processed and approved as task orders through the portal.

ARTICLE IV. SCOPE OF SERVICES

- 4.1 The DESIGN CONSULTANT shall not commence work on this proposed Project until being thoroughly briefed on the scope of the project and being notified in writing to proceed. The scope of the project and the DESIGN CONSULTANT's services required shall be reduced by the DESIGN CONSULTANT to a written Summary of the Scope meeting and included as a part of this Agreement. Should the scope subsequently change, either the DESIGN CONSULTANT or the CITY may request a review of the anticipated services, with an appropriate adjustment in compensation.
- 4.2 The DESIGN CONSULTANT, in consideration for the compensation herein provided, shall render the professional services described in this Section that are necessary for the development of the Project to substantial completion, including plans and specifications, construction services, any special and general conditions, and instructions to bidders as acceptable to the Director, or his duly authorized representative, hereinafter termed "Director", subject to other provisions of this Agreement.
- 4.3 The DESIGN CONSULTANT shall perform its obligations under this Agreement in accordance with Phases outlined in 2.2.3 DESIGN CONSULTANT's Scope of Services attached and incorporated herein as Attachment "1". The Scope of Services shall be the DESIGN CONSULTANT's Proposal, as revised in accordance with negotiations with the CITY and approval of the Director, and as provided in this Agreement.

- 4.4 The DESIGN CONSULTANT will advise and consult with the CITY. The CITY's instruction to the CONSTRUCTION CONTRACTOR may be issued through the DESIGN CONSULTANT but the CITY reserves the right to issue instructions directly to the CONSTRUCTION CONTRACTOR through inspectors or others designated CITY representatives. CONSTRUCTION CONTRACTOR understands that CITY may modify the authority of the DESIGN CONSULTANT as provided in the terms of its contract relationship with the DESIGN CONSULTANT, and the Director shall, in such event, be vested with powers formerly exercised by such DESIGN CONSULTANT, provided written notice of such modification has been promptly served on the CONSTRUCTION CONTRACTOR in writing. Nothing herein shall authorize independent agreements between CONSTRUCTION CONTRACTOR and such DESIGN CONSULTANT, nor shall the DESIGN CONSULTANT be deemed to have a legal relationship with the CONSTRUCTION CONTRACTOR.
- 4.5 Upon acceptance and approval of the plans, reports or other deliverables required for a phase of work, as set forth in the Scope of Services, Director shall authorize DESIGN CONSULTANT, in writing, to proceed with the next phase of work.
- 4.6 The DESIGN CONSULTANT will make visits to the Site at intervals appropriate to the phases (1) to become generally familiar with and to keep the CITY informed about the progress and quality of the portion of the Work completed, and (2) to endeavor to guard the CITY against defects and the Work. However, the DESIGN CONSULTANT will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work.
- 4.7 The DESIGN CONSULTANT will neither have control over or charge of, nor be responsible for, the construction means, methods, techniques, sequences or procedures, or for the safety precautions and programs in connection with the Work, since- these are solely the Contractor's rights and responsibilities under the Contract Documents. The DESIGN CONSULTANT'S efforts will be directed toward providing for CITY a greater degree of confidence that the completed Work will generally conform to the Contract Documents.
- 4.8 The DESIGN CONSULTANT will not be responsible for the CONSTRUCTION CONTRACTOR'S failure to perform the Work in accordance with the requirements of the Contract Documents. The DESIGN CONSULTANT will not have control over or charge of and will not be responsible for acts or omissions of the CONSTRUCTION CONTRACTOR, Subcontractor, or their agents or employees, or any other persons or entities performing portions of the Work
- 4.9 Communications by and with the DESIGN CONSULTANT's consultants shall be through the DESIGN CONSULTANT. Communications by and with Subcontractors and material suppliers shall be through the CONSTRUCTION CONTRACTOR.
- 4.10 Based on the DESIGN CONSULTANT's review of the CONSTRUCTION CONTRACTOR's Application for Payment, the DESIGN CONSULTANT will approve the amounts due the CONSTRUCTION CONTRACTOR and will issue a recommendation for approval for payment in such amounts.
- 4.11 Except as otherwise provided in the Supplementary or Special Conditions, the DESIGN CONSULTANT and the CITY will have authority to reject Work that does not conform to the Contract Documents. Whenever the DESIGN CONSULTANT or CITY considers it necessary or advisable, the DESIGN CONSULTANT will have authority to require inspection or testing of the Work whether or not such Work is fabricated, installed or completed. However, neither this authority of the DESIGN CONSULTANT or CITY nor a decision made by either, in good faith, to exercise or not to exercise such authority shall give rise to a duty or responsibility of the DESIGN CONSULTANT or the CITY to the CONSTRUCTION CONTRACTOR, subcontractors, material and equipment suppliers, agents or employees, or other persons or entities performing portions of the Work.

- 4.12 The DESIGN CONSULTANT will review and approve or take other appropriate action upon the CONSTRUCTION CONTRACTOR's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The DESIGN CONSULTANT will respond to submittals such as Shop Drawings, Product Data, and Samples pursuant to the procedures set forth in the Project specifications. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of equipment or systems, all of which remain the responsibility of the CONSTRUCTION CONTRACTOR as required by the Contract Documents. The DESIGN CONSULTANT's review of the CONSTRUCTION CONTRACTOR's submittals shall not relieve the CONSTRUCTION CONTRACTOR of its obligations. The DESIGN CONSULTANT's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the DESIGN CONSULTANT, or any construction means, methods, techniques, sequences or procedures. The DESIGN CONSULTANT's approval of a specific item shall not indicate approval of an assembly of which the item is a component.
- 4.13 The DESIGN CONSULTANT will, within three (3) days after receipt of the CONSTRUCTION CONTRACTOR's Application for Payment, either issue to the Owner an approval for Payment for such amount as the DESIGN CONSULTANT determines is properly due, or notify the Owner in writing of the DESIGN CONSULTANT's reasons for withholding approval in whole or in part.
- 4.14 The issuance of an approval for Payment will constitute a representation by the DESIGN CONSULTANT to the Owner, based on the DESIGN CONSULTANT's evaluation of the Work and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the DESIGN CONSULTANT's knowledge, information and belief, the quality of the work is in accordance with the Design Contract Documents or Construction Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Agreement Documents upon Substantial completion, to results of subsequent tests and inspections, to correction of minor deviations from the Agreement Documents prior to completion, and to any specific qualifications expressed by the DESIGN CONSULTANT. The issuance of an approval for Payment will further constitute a representation that the DESIGN CONSULTANT and/or CONSTRUCTION CONTRACTOR are entitled to payment in accordance not with the Schedule of Values. The issuance of an approval for Payment will not be a representation that the DESIGN CONSULTANT has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the CONSTRUCTION CONTRACTOR's right to payment, or (4) made any examination to ascertain how or for what purpose the CONSTRUCTION CONTRACTOR has used money previously paid on account of the Agreement Sum.
- 4.15 The DESIGN CONSULTANT may withhold an approval for Payment in whole or in part, to the extent reasonably necessary to protect the Owner if, in the DESIGN CONSULTANT's opinion, the representations to the Owner required by Section 4.14 cannot be made. If the DESIGN CONSULTANT is unable to approve payment in the amount of the Application, the DESIGN CONSULTANT will notify the Owner as provided in Section 4.13. If the Owner and the DESIGN CONSULTANT cannot agree on a revised amount, the DESIGN CONSULTANT will promptly issue an approval for Payment for the amount for which the DESIGN CONSULTANT is able to make such representations to the Owner. The DESIGN CONSULTANT may also withhold an Approval for Payment, because of subsequently discovered evidence, may modify the whole or a part of an approval for Payment to such extent as may be necessary, in the DESIGN CONSULTANT's opinion, to protect the Owner from loss for which the CONSTRUCTION CONTRACTOR is responsible, including loss resulting from acts and omissions described below:

4.15.1 defective Work not remedied;

- 4.15.2 third party claims filed or reasonable evidence indicating probable filing of such claims for which CONSTRUCTION CONTRACTOR is responsible hereunder unless security acceptable to the Owner is provided by the CONSTRUCTION CONTRACTOR;
- 4.15.3 failure of the CONSTRUCTION CONTRACTOR to make payments properly to the subcontractors and/or material providers; or
- 4.15.4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Agreement Sum and CONSTRUCTION CONTRACTOR has failed to provide Owner adequate assurance of its continued performance within a reasonable time after demand;
- 4.15.5 damage to the Owner or another Contractor;
- 4.15.6 reasonable evidence that the Work will not be completed within the Agreement Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- 4.15.7 persistent failure by the CONSTRUCTION CONTRACTOR to carry out the Work in accordance with the Agreement Documents.

The Owner will pay the undisputed portions of such Application for Payment within the time frames established in the Schedule of Values.

- 4.16 When the above reasons for withholding payment are removed, payment will be made for amounts previously withheld. The Owner shall not be deemed in default by reason of withholding payment as provided.
- 4.17 The DESIGN CONSULTANT will prepare Change Orders and Field Work Directives, and with concurrence of the ODR, will have authority to order minor changes in the Work not involving an adjustment in the Total Compensation or an extension of the time for construction. Such changes shall be effected by written order, which the Contractor shall carry out promptly and record on the as-built record documents.
- 4.18 The DESIGN CONSULTANT and the CITY will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion. The DESIGN CONSULTANT will receive and forward to the CITY, for the CITY's review and records, written warranties and related documents required by the Contract and assembled by the CONSTRUCTION CONTRACTOR, and will issue a final Approval for Payment upon compliance with the requirements of the Contract Documents.
- 4.19 Upon written request of the CITY or CONSTRUCTION CONTRACTOR the DESIGN CONSULTANT will issue its interpretation of the requirements of the plans and specifications. The DESIGN CONSULTANT's response to such requests will be made in writing within any time limits agreed upon or otherwise with reasonable promptness. If no agreement is made concerning the time within which interpretations required for the DESIGN CONSULTANT shall be furnished in compliance with Article IV, then delay shall not be recognized on account of failure by the DESIGN CONSULTANT to furnish such interpretations until 15 days after written request is made for them.
- 4.20 Interpretations and decisions of the DESIGN CONSULTANT will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings.
- 4.21 The DESIGN CONSULTANT's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents and not expressly overruled in writing by the CITY.

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ARTICLE V.

- 5.1.1. Follow and comply with the Requirements listed in the City of San Antonio Unified Development Code, as amended, if applicable, which is incorporated by reference herein.
- 5.1.2. Follow and comply with the Requirements for the DESIGN PHASES listed in the CPS and SAWS Design Guidance Manuals, as amended, if applicable, both of which are incorporated by reference herein.

- 5.1.3.1 Review the scope of work furnished by the CITY to ascertain the requirements of the Project and shall review the understanding of such requirements with the CITY.

- 5.1.3.3 Review with the CITY alternative approaches to design and construction of the Project.

- City Public Service (Gas and Electric)

San Antonio Water System (SAWS)

Bexar Metropolitan Water District

Edwards Aquifer Authority

Time Warner Cable

Grande Communications

AT&T

Other utility companies which may be affected

Detailed measurements and surveys for exploration of utilities, if required, will be an additional service as provided in EXHIBIT "2".

- 5.1.3.6 Submit to the CITY a Statement of Probable Construction Cost based on current area, volume or other unit costs.

- 5.1.3.7 Furnish the CITY with three (3) hard copies and one electronic copy (in PDF

format) of the Schematic Design Phase documents. Upon review of said documents, the Director will furnish to the DESIGN CONSULTANT, in writing, authority to proceed with the Design Development Phase on the alternatives selected from the Schematic Design Phase.

5.1.3.8 Plan and coordinate foundation investigations, soil borings, and other tests required for the design of the Project.

5.1.4 Design Development Phase

The DESIGN CONSULTANT shall:

5.1.4.1 Prepare for approval by the CITY, based on the approved program or Project budget, Design Development documents consisting of drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. Prepare and provide a Statement of Probable Construction Cost based on unit costs.

5.1.4.2 Attend three (3) citizens meetings and, as deemed necessary, meet with CITY officials.

5.1.4.3 Furnish the CITY with three (3) hard copies and one electronic copy (in PDF format) of the Design Development documents. One (1) hard copy will be distributed to the Facility User, two (2) hard copies will be retained by the CITY, of which one red lined set will be returned to the DESIGN CONSULTANT, and one (1) electronic copy will be retained by the CITY as a record. Upon review and approval of said documents, the CITY will furnish to the DESIGN CONSULTANT, in writing, authority to proceed with the Construction Documents Phase.

5.1.5 Construction Documents Phase

The DESIGN CONSULTANT shall:

5.1.5.1 Furnish all data required by the CITY for the development of any applications or supporting documents for State or Federal Government permits, grants or planning advances, provided that such data shall not extend beyond that actually developed in the performance of other provisions of this Agreement.

5.1.5.2 Attend not more than three (3) citizens meetings and, as deemed necessary, meet with CITY officials.

5.1.5.3 Prepare detailed contract drawings and specifications, after authorization has been received from the CITY to proceed with the Construction Documents Phase. These designs shall combine in all respects the applications of sound architectural principles with a high degree of economy.

5.1.5.3.1 Detailed specifications shall be developed as applicable, to the particular project.

5.1.5.3.2 A specimen copy of standard general provisions, instructions to bidders, and applicable prevailing wage rates will be furnished to the DESIGN CONSULTANT by the CITY for incorporation in the specifications of the proposed Project.

5.1.5.4 Prior to the actual printing of the final Construction Documents (plans, specifications and proposals) one (1) advance copy shall be submitted to the CITY. Upon review and approval of said documents, the DESIGN CONSULTANT shall provide and submit same to the CITY as follows:

5.1.5.4.1 DESIGN CONSULTANT shall submit one (1) set of Plans and Specifications for review of State Handicapped Requirements to the:

Texas Department of Licensing & Regulation
Architectural Barriers, Program Manager

E.O. Thompson State Office Building,
P. O. Box 12157
Austin, Texas 78711

5.1.5.4.2 DESIGN CONSULTANT shall submit three (3) sets of Plans and Specifications to the City Architect's Office for the City Architect, Building Maintenance and the Department Director.

5.1.5.4.3 DESIGN CONSULTANT shall deliver one (1) set of Plans and Specifications in electronic format (PDF format) to the City's Plans and Records Office, CIMS, Contract Services.

5.1.5.6 DESIGN CONSULTANT shall advise the CITY of any adjustments to previous Statements of Probable Construction Cost indicated by changes in requirements or general market conditions.

5.1.5.7 Upon the direction of the CITY, issue Plans and Specifications for bidding purposes, receive and record plan deposits; prepare, issue and deliver all addenda required to perfect the bid documents; maintain a record of issuance and receipt of same; furnish to the CITY a statement that the DESIGN CONSULTANT has provided and all bidders have received the Plans and Specifications and any necessary addenda thereto prior to opening of the bids. Attend the Pre-Bid Conference as scheduled by the CITY to provide clarification and interpretation to bidders.

5.1.5.8 In consultation with the City set a charge for plans and specifications (bid documents) based on the cost of printing and handling, said charge to be assessed all bidders and vendors. Return of bid documents and any refund to be made will be in accordance with normal city policy.

5.1.5.9 Once the Construction Contract is signed, the successful bidder's document deposit along with all available sets of documents will be turned over to the CONSTRUCTION CONTRACTOR. DESIGN CONSULTANT shall provide to the City additional sets of contract documents as required for the successful bidder and subcontractors to use during the construction phase. The DESIGN CONSULTANT will then be reimbursed by the City for the cost of all document sets furnished to bidders for bid purposes and to the Contractor for construction purposes in accordance with Appendix "A".

5.1.5.10 Attend the formal opening of bids and shall tabulate and furnish to the CITY a bid tabulation together with DESIGN CONSULTANT's recommendation regarding the award of the contract within 5 working days from the date of bid opening.

5.1.5.11 DESIGN CONSULTANT shall provide all documents to the City in the form as specified by the City which may include hard copies as well as electronic versions.

5.1.6 Construction Phase The DESIGN CONSULTANT shall:

5.1.6.1 Attend a Pre-Construction Conference with the Representatives of the interested Departments.

5.1.6.2 Visit the site in intervals appropriate to the stage of construction or as otherwise agreed by the DESIGN CONSULTANT in writing to become generally familiar with the progress and quality of the work and to determine in general if the work is proceeding in accordance with the Contract Documents. However, the DESIGN CONSULTANT shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the work. On the basis of such on site observations as a professional consultant, the DESIGN CONSULTANT should keep the City informed of the progress and quality of each major division of the work and shall endeavor to guard the City against defects and deficiencies in the work of the Contractor. The DESIGN CONSULTANT shall provide the CITY with a Memorandum Record of each jobsite visit and shall submit a Monthly Report to the CITY plus two additional copies as determined by the City. The Monthly Report shall include the status of the project, and information to indicate the progress and performance of the Contractor in accordance with the Contract Documents.

5.1.6.3 Review Contractor's building construction layout, specifically foundation elevations.

5.1.6.4 DESIGN CONSULTANT shall not be responsible for the means, methods, techniques, sequences or procedures of construction selected by the Contractor or the safety precautions and programs incident to the work of the Contractor.

5.1.6.5 The DESIGN CONSULTANT's efforts will be directed towards providing assurance for the CITY that the completed project will conform to the Plans and Specifications. The DESIGN CONSULTANT shall not be responsible for the failure of the Contractor to perform the construction work in accordance with the Plans and Specifications and the Contractor's contract. However, the DESIGN CONSULTANT shall report to the City any deficiencies in the work actually detected by the DESIGN CONSULTANT.

5.1.6.6 Submittals: DESIGN CONSULTANT shall review and take other appropriate action (approve with modifications, reject, etc.) upon the Contractor's submittals such as shop drawings, product data and samples, but only for conformance with the design concept of the Project and compliance with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. Such reviews and approvals, or other actions, shall not extend to means, methods, techniques, sequences, or procedures of construction, or to safety precautions and program incident thereto. The approval of a specific item shall not indicate approval of an assembly of which the item is a component.

5.1.6.7 Receive and review certificates of inspections, testing (to include field, laboratory, shop and mill testing of materials) and approvals required by laws, rules, regulations, ordinances, codes, orders or the Contract Documents to determine generally that the results certified substantially comply with the Contract Documents which are submitted to him. The Consultant shall also recommend to the City special inspection or testing when deemed necessary to assure that materials, products, assemblages and equipment conform to the design concept and the Contract Documents.

5.1.6.8 Review and approve in concert with the CITY all colors, materials, fabrics, etc., relating to finishes required.

5.1.6.9 Review and approve in concert with the CITY equipment required to be submitted and tested by the Plans and Specifications for compliance with Project design and performance specifications.

5.1.6.10 Determine the amounts owing to the Contractor based on observations at the site and on evaluations of the Contractor's Monthly Estimates (and Final Estimate) and issue recommendations to the CITY for payment of such amounts as provided in the Contract Documents.

The issuance of a Recommendation For Payment shall constitute a representation by the DESIGN CONSULTANT to the CITY based on the DESIGN CONSULTANT's observations at the site as provided herein and in the data comprising the Contractor's Monthly Estimate (and Final Estimate), that the work has progressed to the point indicated; that to the best of the DESIGN CONSULTANT's knowledge, information and belief, the quality of work is in accordance with the Contract Documents (subject to an evaluation of the work for conformance with the Contract Document upon substantial completion, to the results of any subsequent test required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Recommendation For Payment); and that the Contractor is entitled to payment in the amount recommended. However, the issuance of a Recommendation For Payment shall not be representation that the DESIGN CONSULTANT has made an examination to ascertain how, and for what purpose the Contractor has used the monies paid on account of the contract sum.

5.1.6.11 Observe the initial start-up of the Project and the necessary performance tests required by the Specifications of any machinery or equipment installed in and made a part of the Project. The Consultant shall advise the City representatives if, in his opinion, the

machinery or equipment is not operating properly.

5.1.6.12 Perform in company with the CITY representative(s) a "conditional approval" and a "final" inspection of the Project to observe any apparent defects in the completed construction, assist the CITY in consultation and discussions with the Contractor(s) concerning such deficiencies, and make recommendations as to replacements or corrections of the defective work.

5.1.6.13 After completion of the work, and before final payment to the Contractor, it shall be the CONSULTANT's responsibility to recommend to the CITY that the CONSTRUCTION CONTRACTOR receive final payment from the CITY based on the completion of all close-out activities including the delivery of "Record Drawings" by the CONSTRUCTION CONTRACTOR, who has control of the work and who is in a position to know how the Project was constructed. The DESIGN CONSULTANT, after receiving this information shall provide "Record Drawings" in electronic format to the CITY. Additionally, the CITY may require DESIGN CONSULTANT to transfer the information to a set of "Mylar" tracings as "Record Drawings" or documents for the City's permanent file. "Record Drawings" shall be provided by Consultant at no additional cost to the City. The Consultant shall not be held liable for the information supplied him by the CONSTRUCTION CONTRACTOR and/or City representative.

5.1.6.14 The City will require the CONSTRUCTION CONTRACTOR to submit to the DESIGN CONSULTANT who shall review and deliver to the CITY all manufacturer's warranties or bonds, equipment maintenance and operating manuals, and similar data on materials and equipment incorporated in the Project as required by the Contract Document and shall attend and monitor the CONSTRUCTION CONTRACTOR's commissioning and training of systems and equipment as applicable.

5.1.6.15 Develop, at the request of the CITY, any changes, alterations or modifications to the Project, which appear to be advisable and feasible, and in the best interest of the CITY. Such alterations shall appear on or be attached to the CITY's form "Change Order Request". The DESIGN CONSULTANT shall obtain the Contractor's acceptance of the proposed alteration prior to submitting it to the CITY for its approval. No work shall be authorized to be done by the Contractor prior to receipt of the CITY's approval of the "Change Order Request".

ARTICLE VI. TIME AND PERIOD OF SERVICE

- 6.1 Prior to commencement of any work, Design Consultant shall provide CITY with a schedule of PROJECT DESIGN PHASES, Exhibit 1.
- 6.2 Time is of the essence of this Agreement. The DESIGN CONSULTANT shall perform and complete its obligations for the various Phases of work under Section IV "Scope of Service" of this Agreement in a prompt and continuous manner so as to not delay the development of the design work and so as to not delay the construction of the work for the Project in accordance with the schedules approved by the CITY with the CONSTRUCTION CONTRACTOR. If, upon review of phase work, corrections, modifications, alterations, or additions are required of the DESIGN CONSULTANT, these items shall be completed by the DESIGN CONSULTANT before that Phase is approved.
- 6.3 The DESIGN CONSULTANT shall not proceed with the next appropriate Phase of work without written authorization from the Director. The CITY may elect to discontinue the DESIGN CONSULTANT's services at the end of any Phase for any reason. However, if circumstance dictates, the Director may make adjustments to the scope of the DESIGN CONSULTANT's obligations at any time to achieve the required design.

- 6.4 The DESIGN CONSULTANT shall not be liable or responsible for any delays due to strikes, riots, acts of God, national emergency, acts of the public enemy, governmental restrictions, laws or regulations, or any other causes beyond DESIGN CONSULTANT's reasonable control. Within twenty one (21) days from the occurrence of any event for which time for performance by DESIGN CONSULTANT shall be significantly extended under this provision, DESIGN CONSULTANT shall give written notice thereof to the CITY stating the reason for such extension and the actual or estimated time thereof. If the CITY determines that the DESIGN CONSULTANT is responsible for the need for extended time, the CITY shall have the right to make a Claim as provided in this Agreement.
- 6.5 This Agreement shall remain in force for a period which may reasonably be required for the design, award of the contract, and construction of the Project including any extra work and any required extensions thereto unless discontinued as provided for elsewhere in this Agreement.

ARTICLE VII. COORDINATION WITH THE CITY

- 7.1 The DESIGN CONSULTANT shall hold periodic conferences with the Director or his representatives to the end that the Project as developed shall have the full benefit of the CITY's experience and knowledge of existing needs and facilities, and be consistent with its current policies and standards. To assist the DESIGN CONSULTANT in this coordination, the CITY shall make available for the DESIGN CONSULTANT's use in planning and designing the Project all existing plans, maps, statistics, computations and other data in its possession relative to existing facilities and to this particular Project, at no cost to the DESIGN CONSULTANT. However, any and all such information shall remain the property of the CITY and shall be returned by the DESIGN CONSULTANT upon termination or completion of the Project or if instructed to do so by the Director.
- 7.2 The Director will act on behalf of, the CITY with respect to the work to be performed under this Agreement. The Director shall have complete authority to transmit instructions, receive information, interpret and define the CITY'S policies and decisions with respect to materials, equipment, elements and systems pertinent to the DESIGN CONSULTANT's services.
- 7.3 The CITY will give prompt written notice to the DESIGN CONSULTANT whenever the CITY observes or otherwise becomes aware of any defect in the DESIGN CONSULTANT's services, in the work of the CONSTRUCTION CONTRACTOR, or any development that affects the scope or timing of the DESIGN CONSULTANT's services.
- 7.4 Unless otherwise required by the CITY, the CITY shall furnish approvals and permits from all governmental authorities having jurisdiction over the Project and such approvals and consents from others as may be necessary for the completion of the Project. The DESIGN CONSULTANT will provide the CITY reasonable assistance in connection with such approvals and permits such as the furnishing of data compiled by the DESIGN CONSULTANT pursuant to other provisions of the Agreement, but the DESIGN CONSULTANT shall not be obligated to develop additional data, prepare extensive reports or appear at hearings or the like unless compensated therefore under other provisions of this Agreement.

**ARTICLE VIII.
REVISIONS TO DRAWINGS AND SPECIFICATIONS**

- 8.1 The DESIGN CONSULTANT shall make without expense to the CITY such revisions to the drawings, reports or other documents as may be required to meet the needs of the CITY which are within the Scope of the Project, but after the approval of drawings, reports or other documents and specifications by the CITY, any revisions, additions, or other modifications made at the CITY's request which involves extra services and expenses to the DESIGN CONSULTANT shall be at additional compensation to the DESIGN CONSULTANT for such extra services and expenses, subject to Exhibit 2.
- 8.2. The Director may require the DESIGN CONSULTANT to revise the Construction Document Phase drawings, reports or other documents and specifications, at no cost to the CITY, if the lowest bona fide bid is in excess of fifteen percent (15%) of the amount of the fixed limit or the Design Development Phase cost estimate as submitted by the DESIGN CONSULTANT, and accepted by the CITY.

**ARTICLE IX.
OWNERSHIP OF DOCUMENTS**

- 9.1 All previously owned documents, including the original drawings, estimates, specifications, and all other documents and data by DESIGN CONSULTANT, will remain the property of the DESIGN CONSULTANT as instruments of service. However, the DESIGN CONSULTANT understands and agrees that the CITY shall have free access to all such information with the right to make and retain copies of previously owned drawings, estimates, specifications and all other documents and data. Any reuse without specific written verification or adaptation by DESIGN CONSULTANT will be at CITY's sole risk and without liability or legal exposure to DESIGN CONSULTANT.
- 9.2 All completed documents submitted by DESIGN CONSULTANT for final approval or issuance of a permit shall bear the seal with signature and date adjacent thereto of a Texas registered Architect/Landscape Architect licensed to practice in Texas.
- 9.3 The DESIGN CONSULTANT acknowledges and agrees that upon payment, the CITY shall own exclusively any and all information in whatsoever form and character produced and/or maintained in accordance with, pursuant to, or as a result of this Agreement and shall be used as the CITY desire and documents, including the original drawings, estimates, specifications and all other documents and data shall be delivered to the CITY at no additional cost to the CITY upon request or termination or completion of this AGREEMENT without restriction on future use. However, any reuse without specific written verification or adaptation by DESIGN CONSULTANT will be at CITY's sole risk and without liability or legal exposure to DESIGN CONSULTANT.
- 9.4 The DESIGN CONSULTANT agrees and covenants to protect any and all proprietary rights of the CITY in any materials provided to the DESIGN CONSULTANT. Such protection of proprietary rights by the DESIGN CONSULTANT shall include, but not be limited to, the inclusion in any copy intended for publication of copyright mark reserving all rights to the CITY. Additionally, any materials provided to the DESIGN CONSULTANT by the CITY shall not be released to any third party without the written consent of the CITY and shall be returned intact to the CITY upon termination or completion of this Agreement or if instructed to do so by the Director.
- 9.5 **THE DESIGN CONSULTANT HEREBY ASSIGNS ALL STATUTORY AND COMMON LAW COPYRIGHTS TO ANY COPYRIGHTABLE WORK THAT IN PART OR IN WHOLE WAS PRODUCED FROM THIS AGREEMENT TO THE CITY, INCLUDING ALL EQUITABLE RIGHTS. NO REPORTS, MAPS, DOCUMENTS OR OTHER COPYRIGHTABLE WORKS PRODUCED IN WHOLE OR IN PART BY THIS AGREEMENT SHALL BE SUBJECT OF AN APPLICATION FOR COPYRIGHT BY THE**

DESIGN CONSULTANT. ALL REPORTS, MAPS, PROJECT LOGOS, DRAWINGS OR OTHER COPYRIGHTABLE WORK PRODUCED UNDER THIS AGREEMENT SHALL BECOME THE PROPERTY OF THE CITY (EXCLUDING ANY PRIOR OWNED INSTRUMENT OF SERVICES, UNLESS OTHERWISE SPECIFIED HEREIN). THE DESIGN CONSULTANT SHALL, AT ITS EXPENSE, INDEMNIFY CITY AND DEFEND ALL SUITS OR PROCEEDINGS INSTITUTED AGAINST THE CITY AND PAY ANY AWARD OF DAMAGES OR LOSS RESULTING FROM AN INJUNCTION, AGAINST THE CITY, INsofar AS THE SAME ARE BASED ON ANY CLAIM THAT MATERIALS OR WORK PROVIDED UNDER THIS AGREEMENT CONSTITUTE AN INFRINGEMENT OF ANY PATENT, TRADE SECRET, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHTS.

- 9.6 The DESIGN CONSULTANT may make copies of any and all documents and items for its files. The DESIGN CONSULTANT shall have no liability for changes made to or use of the drawings, specifications and other documents by other architects and/or engineers, or other persons, subsequent to the completion of the Project. DESIGN CONSULTANT shall appropriately mark all changes or modifications on all drawings, specifications and other documents by other architects and/or engineers or other persons, including electronic copies, subsequent to the completion of the Project.
- 9.7 Copies of documents that may be relied upon by the CITY are limited to the printed copies (also known as hard copies) and PDF electronic versions that are sealed and signed by the DESIGN CONSULTANT. Files in editable electronic media format of text, data, graphics, or other types, (such as DGN) that are furnished by the DESIGN CONSULTANT to the CITY are only for convenience of the CITY or utility. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. However, any reuse without specific written verification or adaptation by DESIGN CONSULTANT will be at CITY's sole risk and without liability or legal exposure to DESIGN CONSULTANT.
- 9.8 Notwithstanding anything to the contrary contained herein, all previously owned intellectual property of DESIGN CONSULTANT, including but not limited to any computer software (object code and source code), tools, systems, equipment or other information used by DESIGN CONSULTANT or its suppliers in the course of delivering the Services hereunder, and any know-how, methodologies, or processes used by the DESIGN CONSULTANT to provide the services or protect deliverables to CITY, including without limitation, all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent therein and appurtenant thereto shall remain the sole and exclusive property of DESIGN CONSULTANT or its suppliers.

ARTICLE X. TERMINATION AND/OR SUSPENSION OF WORK

10.1 Right of Either Party to Terminate for Default

- 10.1.1 This Agreement may be terminated by either party for substantial failure by the other party to perform (through no fault of the terminating party) in accordance with the terms of this Agreement and a failure to cure as provided in this Paragraph 9.1.
- 10.1.2 The party not in default must issue a signed, written notice of termination (citing this paragraph) to the other party declaring the other party to be in default and stating the reason(s) why they are in default. Upon receipt of such written notice of default, the party in receipt shall have a period of ten (10) days to cure any failure to perform under this Agreement. Upon the completion of such ten-day period commencing upon receipt of notice of termination, if such party has not cured any failure to perform, such termination shall become effective without further written notice.

10.2 Right of CITY to Terminate

10.2.1 The CITY reserves the right to terminate this Agreement for reasons other than substantial failure by the DESIGN CONSULTANT to perform by issuing a signed, written notice of termination (citing this paragraph) which shall take effect on the twentieth day following receipt of said notice and upon the scheduled completion date of the performance phase in which DESIGN CONSULTANT is then currently working, whichever effective termination date occurs first.

10.3 Right of CITY to Suspend Giving Rise to Right of DESIGN CONSULTANT to Terminate

10.3.1 The CITY reserves the right to suspend this Agreement at the end of any phase for the convenience of the CITY by issuing a signed, written notice of suspension (citing this paragraph) which shall outline the reasons for the suspension and the expected duration of the suspension, but such expected duration shall in no way will guarantee what the total number of days of suspension will occur. Such suspension shall take effect immediately upon receipt of said notice of suspension by the DESIGN CONSULTANT.

10.3.2 The DESIGN CONSULTANT is hereby given the right to terminate this Agreement in the event such suspension extends for a period in excess of one hundred twenty (120) days. DESIGN CONSULTANT may exercise this right to terminate by issuing a signed, written notice of termination (citing this paragraph) to the CITY after the expiration of one hundred twenty (120) days from the effective date of the suspension. Termination (under this paragraph) shall become effective immediately upon receipt of said written notice by the CITY.

10.4 Procedures DESIGN CONSULTANT to follow upon Receipt of Notice of Termination

10.4.1 Upon receipt of a notice of termination and prior to the effective date of termination, unless the notice otherwise directs or DESIGN CONSULTANT immediately takes action to cure a failure to perform under the cure period set out hereinabove, DESIGN CONSULTANT shall immediately begin the phase-out and the discontinuance of all services in connection with the performance of this Agreement and shall proceed to promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement. Within thirty (30) days after receipt of such notice of termination (unless DESIGN CONSULTANT has successfully cured a failure to perform) the DESIGN CONSULTANT shall submit a statement showing in detail the services performed under this Agreement prior to the effective date of termination. The CITY shall have the option to grant an extension to the time period for submittal of such statement.

10.4.2 Copies of all completed or partially completed specifications and all reproductions of all completed or partially completed designs, plans and exhibits prepared under this Agreement prior to the effective date of termination shall be delivered to the CITY, in the form requested by the CITY as a pre-condition to final payment. These documents shall be subject to the restrictions and conditions set forth in Article IX above.

10.4.3 Upon the above conditions being met, the CITY shall promptly pay the DESIGN CONSULTANT that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previous payments of the fee.

10.4.4 The CITY, as a public entity, has a duty to document the expenditure of public funds. The DESIGN CONSULTANT acknowledges this duty on the part of the CITY. To this end, the DESIGN CONSULTANT understands that failure of the DESIGN CONSULTANT to comply with the submittal of the statement and documents as required above shall constitute a waiver by the DESIGN CONSULTANT of any and all rights or claims to payment for services performed under this Agreement by the DESIGN CONSULTANT.

10.4.5 Failure of the DESIGN CONSULTANT to comply with the submittal of the statement and documents as required above shall constitute a waiver by the DESIGN CONSULTANT of any and all rights or claims to collect monies that DESIGN CONSULTANT may otherwise be entitled to for services performed under this Agreement.

10.5 Procedures DESIGN CONSULTANT to Follow upon Receipt of Notice of Suspension

10.5.1 Upon receipt of written notice of suspension, which date shall also be the effective date of the suspension, the DESIGN CONSULTANT shall, unless the notice otherwise directs, immediately begin to phase-out and discontinue all services in connection with the performance of this Agreement and shall proceed to promptly suspend all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement.

10.5.2 DESIGN CONSULTANT shall prepare a statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

10.5.3 Copies of all completed or partially completed designs, plans and specifications prepared under this Agreement prior to the effective date of suspension shall be prepared for possible delivery to the CITY but shall be retained by the DESIGN CONSULTANT until such time as DESIGN CONSULTANT may exercise the right to terminate.

10.5.4 In the event that DESIGN CONSULTANT exercises the right to terminate one hundred twenty (120) days after the effective suspension date, within thirty (30) days after receipt by the CITY of DESIGN CONSULTANT's notice of termination, DESIGN CONSULTANT shall promptly cancel all existing orders and contracts insofar as such orders and contracts are chargeable to this Agreement and shall submit the above referenced statement showing in detail the services performed under this Agreement prior to the effective date of suspension.

10.5.5 Any documents prepared in association with this Agreement shall be delivered to the CITY as a pre- condition to final payment.

10.5.6 Upon the above conditions being met, the CITY shall promptly pay the DESIGN CONSULTANT that proportion of the prescribed fee which the services actually performed under this Agreement bear to the total services called for under this Agreement, less previous payments of the fee.

10.5.7 The CITY, as a public entity, has a duty to document the expenditure of public funds. DESIGN CONSULTANT acknowledges this duty on the part of the CITY. To this end, DESIGN CONSULTANT understands that failure of Consultant to substantially comply with the submittal of the statements and documents as required herein shall constitute a waiver by the DESIGN CONSULTANT of any portion of the fee for which DESIGN CONSULTANT did not supply such necessary statements and/or documents.

**ARTICLE XI.
DESIGN CONSULTANT'S WARRANTY**

11.1 The DESIGN CONSULTANT warrants that the services required under this Agreement will be performed with the same degree of professional skill and care that are typically exercised by similar consulting professionals performing similar services in Bexar County, Texas. The DESIGN CONSULTANT further warrants that it has not employed or retained any company or person other than a bona fide employee working solely for the DESIGN CONSULTANT to solicit or secure this Agreement, and that it has not, for the purpose of soliciting or securing this Agreement, paid or agreed to pay any company or

person, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach of this warranty, the CITY shall have the right to terminate this Agreement under the provisions of Article X above.

ARTICLE XII.

SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY (SBEDA) PROGRAM

12.1 DEFINITIONS

- 12.1.1 SBEDA Program. The CITY has adopted a Small Business Economic Development Advocacy Ordinance (the "SBEDA Program"), which is posted on the City's Economic Development Department website and is also available in hard copy form upon request to the CITY. In addition to the definitions provided in the SBEDA Program, the following definitions will apply pursuant to SBEDA Program requirements and this Agreement:
- 12.1.2 SBEDA Enterprise ("SE") – A corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the state of Texas and certified pursuant to SBEDA Program requirements.
- 12.1.3 Commercially Useful Function – A function performed by an SE when it is responsible for supplying goods or for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an SE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated. Commercially Useful Function is measured for purposes of determining participation on a contract, not for determination of certification eligibility.
- 12.1.4 Conduit – An SE that knowingly agrees to pass the scope of work for which it is listed for participation, and is scheduled to perform or supply on the contract, to a non-SE firm. In this type of relationship, the SE has not performed a Commercially Useful Function and the arranged agreement between the two parties is not consistent with standard industry practice. This arrangement does not meet the Commercially Useful Function requirement and therefore the SE's participation does not count toward the SE utilization goal.
- 12.1.5 SBEDA Plan – The Good Faith Effort Plan ("GFEP"), SBEDA Narrative, List of Subcontractors/Suppliers and executed Letters of Intent (all as applicable) that are submitted with CONSULTANT's submittal for this project Agreement, attached hereto and incorporated herein as "Exhibit 3".

12.2 For this Agreement, the Parties agree that:

- 12.2.1 The terms of the CITY's SBEDA Ordinance, as amended, together with all requirements and guidelines established under or pursuant to the Ordinance (collectively, the "SBEDA Program") are incorporated into this Agreement by reference; and
- 12.2.2 The failure of CONSULTANT or any applicable SE to comply with any provision of the SBEDA Program shall constitute a material breach of the SBEDA Program and this Agreement.
- 12.2.3 Failure of CONSULTANT or any applicable SE to provide any documentation or written submissions required by the CITY Managing Department or SBEDA Program Office pursuant to the SBEDA Program, within the time period set forth by the SBEDA Program Office, shall constitute a material breach of the SBEDA Program and this Agreement.

- 12.2.4 During the Term of this Agreement, and any renewals thereof, any unjustified failure to utilize good faith efforts to meet, and maintain, the levels of SE participation identified in CONSULTANT's SBEDA Plan ("Exhibit 3") shall constitute a material breach of the SBEDA Program and this Agreement.
- 12.2.5 CONSULTANT shall pay all suppliers and subcontractors identified in its SBEDA Plan ("Exhibit 3") in a timely manner for satisfactory work, pursuant to and as outlined in Section VII, Paragraph F(2)(e) of the SBEDA Ordinance, as amended. Documentation of all billing and payment information applicable to SBEDA Plan suppliers and subcontractors shall be submitted by CONSULTANT to the CITY Managing Department. Failure to pay SEs in a timely manner or submit the required billing and payment documentation shall constitute a material breach of this Agreement.
- 12.3 **The Parties also agree that the following shall constitute a material breach of the SBEDA Program and this Agreement:**
- 12.3.1 Failure of CONSULTANT to utilize an SE that was originally listed at bid opening or proposal/SOQ submission to satisfy SBEDA Program goals in order to be awarded this Agreement, or failing to allow such SE to perform a Commercially Useful Function; or
- 12.3.2 Modification or elimination by CONSULTANT of all or a portion of the scope of work attributable to an SE upon which the Agreement was awarded; or
- 12.3.3 Termination by CONSULTANT of an SE originally utilized as a Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker in order to be awarded the Agreement without replacing such SE with another SE performing the same Commercially Useful Function and dollar amount, or without demonstrating each element of Modified Good Faith Efforts to do so; or
- 12.3.4 Participation by CONSULTANT in a Conduit relationship with an SE scheduled to perform work that is the subject of this Agreement.
- 12.4 **Remedies for Violation of SBEDA Program.** The Parties further agree that in addition to any other remedies the CITY may have at law or in equity, or under this Agreement for material breach, including the specified remedies available under the SBEDA Program for Alternative Construction Delivery Method, the CITY shall be entitled, at its election, to exercise any one or more of the following remedies if the CONSULTANT materially breaches the requirements of the SBEDA Program:
- 12.4.1 Terminate this Agreement for default;
- 12.4.2 Suspend this Agreement for default;
- 12.4.3 Withhold all payments due to the CONSULTANT under this Agreement until such violation has been fully cured or the Parties have reached a mutually agreeable resolution; and/or
- 12.4.4 Offset any amounts necessary to cure any material breach of the requirements of the SBEDA Program from any retainage being held by the CITY pursuant to the Agreement, or from any other amounts due to the CONSULTANT under the Agreement.
- 12.4.5 Suspension, Revocation or Modification of SE Certification: The SBEDA Program Office may suspend or revoke an offending SE's eligibility for Certification, and may suspend its participation from counting toward a project goal, based upon such SE's acting as a Conduit, failing to comply with the provisions of the SBEDA Program, failing to perform a Commercially Useful Function on a project, failing to submit information as required by the SBEDA Program Office, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations. The SBEDA Program Office may further modify the list of areas for which an SE is certified, if the SE is routinely failing to submit bids or proposals for work in a particular area, or if it becomes apparent

that the SE is not qualified to perform work in a particular area.

The Parties agree that nothing in the SBEDA Program or that any action or inaction by the SBEDA Program Office or the SBEDA Program Manager shall be deemed a representation or certification that an SE is qualified to perform work in a particular area for the purposes of this Agreement.

The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy.

12.5 **City Process for Exercising SBEDA Program Remedies.** The SBEDA Program Manager shall make all decisions regarding the suspension or revocation of an SE's certification as well as the duration of such suspension or revocation. The SBEDA Program Manager shall make a recommendation to the Managing Department Director regarding appropriate remedies for the CITY to exercise in the event a Contractor violates the SBEDA Program. The Managing Department Director shall make a recommendation regarding appropriate remedies to the City Manager or designee, who shall have final recommendation regarding the remedy to be exercised except for termination of the Agreement. If the recommended remedy is to terminate the Agreement, then the Managing Department Director or City Manager, or her designee, shall bring forward the recommendation to City Council for final determination.

12.6 **Special Provisions for Extension of Agreements.** In the event the CITY extends this Agreement without a competitive Bid process, the CITY Managing Department responsible for monitoring the Agreement shall establish the following, subject to review and approval by the SBEDA Program Manager:

12.6.1 A SBEDA Utilization Goal for the extended period; and

12.6.2 A modified version of the Good Faith Efforts ("Modified Good Faith Efforts Plan") set forth in the SBEDA Program Ordinance, as amended, if CONSULTANT does not meet the SBEDA Utilization Goal; and

12.6.3 The required minimum Good Faith Efforts outreach attempts that CONSULTANT shall be required to document in attempting to meet the SBEDA Utilization Goal. The SBEDA Utilization Goal, Modified Good Faith Efforts Plan and the required number of minimum Good Faith Efforts outreach attempts shall be added into the Agreement extension document. The CONSULTANT entering into the extension shall either meet the SBEDA Utilization Goal or document that it has made the Good Faith Efforts to meet the SBEDA Utilization Goal. Failure to do so shall:

12.6.3.1 Subject CONSULTANT to any of the remedies listed above; and/or

12.6.3.2 Result in resolicitation of the Agreement to be extended.

**ARTICLE XIII.
ASSIGNMENT OR TRANSFER OF INTEREST**

13.1 The DESIGN CONSULTANT shall not assign or transfer DESIGN CONSULTANT's interest in this Agreement without the written consent of the CITY.

**ARTICLE XIV.
INSURANCE REQUIREMENTS**

- 14.1 Prior to the commencement of any Services under this Agreement, the DESIGN CONSULTANT shall furnish copies of all required endorsements and an original completed Certificate(s) of Insurance to the CITY's Capital Improvement Management Services Department/Public Works Department/Contract Services Department, which shall be clearly labeled "**insert name of project/contract**" in the Description of Operations block of the Certificate. The original Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The CITY will not accept Memorandum of Insurance or Binders as proof of insurance. The original certificate(s) or form must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the CITY. The CITY shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the CITY's Capital Improvements Management Services Department/Public Works Department/Contract Services Department. No officer or employee other than the CITY's Risk Manager shall have authority to waive this requirement.
- 14.2 The CITY reserves the right to review the insurance requirements of this Article during the effective period of this contract and any extension or renewal hereof and to request modification of insurance coverages and their limits when deemed necessary and prudent by CITY's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this contract. In no instance will CITY allow modification whereupon CITY may incur increased risk.
- 14.3 A DESIGN CONSULTANT's financial integrity is of interest to the CITY. Therefore, subject to the DESIGN CONSULTANT's right to maintain reasonable deductibles in such amounts as are approved by the CITY, the DESIGN CONSULTANT shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at the DESIGN CONSULTANT's sole expense, insurance coverage written on an occurrence or claims made basis, as appropriate, by companies authorized and approved to do business in the State of Texas and with an A.M. Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed:

INSURANCE REQUIREMENTS	
1. Worker's Compensation ** Employer's Liability	Statutory \$1,000,000/\$1,000,000/\$1,000,000
2. Commercial General Broad Form (Public) Liability Insurance to include coverage for the following: a. Premises Operations b. Independent contractors* c. Products/completed operations d. Personal Injury e. Contractual Liability f. Fire legal liability*	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its Equivalent in Umbrella or Excess Liability Coverage
3. Business Automobile Liability* a. Owned/leased vehicles b. Non-owned vehicles c. Hired vehicles	Combined Single Limit for Bodily Injury and Property Damage of \$1,000,000 per occurrence
4. Professional Liability (Claims Made Form)	\$1,000,000 per claim to pay on behalf of the insured all sums, which the insured shall become legally obligated to pay as damages to the extent caused by any negligent act, error or omission in the performance of professional services.
*If Applicable	
** Alternate Plans Must Be Approved by Risk Management	

14.4 The CITY may request and without expense to CITY, to inspect copies of the policies, declarations page and all endorsements thereto as they apply to the limits required by the CITY.

14.5 The DESIGN CONSULTANT agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following required provisions:

- Name the CITY and its officers, officials, employees, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the CITY, with the exception of the workers' compensation and professional liability policies;
- To the extent not inconsistent with the requirements of the issuing insurance carrier, provide for an endorsement that the "other insurance" clause shall not apply to the CITY where the CITY is an additional insured shown on the policy if such endorsement is permitted by law and regulations;
- Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the CITY; and
- Provide thirty (30) calendar days advance written notice directly to CITY of any suspension, cancellation or non-renewal or material change in coverage, and not less than ten (10) calendar days advance written notice for nonpayment of premium.

- 14.6 Within five (5) calendar days of a suspension, cancellation or non-renewal of coverage, the DESIGN CONSULTANT shall provide a replacement Certificate of Insurance and applicable endorsements to CITY. CITY shall have the option to suspend the DESIGN CONSULTANT's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this contract.
- 14.7 In addition to any other remedies the CITY may have upon the DESIGN CONSULTANT's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the CITY shall have the right to order the DESIGN CONSULTANT to stop performing services hereunder and/or withhold any payment(s) which become due to the DESIGN CONSULTANT hereunder until the DESIGN CONSULTANT demonstrates compliance with the requirements hereof.
- 14.8 Nothing herein contained shall be construed as limiting in any way the extent to which the DESIGN CONSULTANT may be held responsible for payments of damages to persons or property resulting from the DESIGN CONSULTANT's or its sub-consultant's performance of the services covered under this Agreement.
- 14.9 It is agreed that the DESIGN CONSULTANT's insurance shall be deemed primary and non-contributory with respect to any insurance or self insurance carried by the CITY for liability arising out of operations under this Agreement.
- 14.10 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement as respects additional insureds.

ARTICLE XV. INDEMNIFICATION

- 15.1 **The DESIGN CONSULTANT, whose work product and services are the subject of this Agreement for professional services, agrees to INDEMNIFY AND HOLD CITY, ITS ELECTED OFFICIALS, OFFICERS, AGENTS AND EMPLOYEES HARMLESS against any and all claims by third parties, lawsuits, judgments, cost, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury (including death), property damage, or other harm for which recovery of damages is sought that may ARISE OUT OF OR BE OCCASIONED OR CAUSED BY DESIGN CONSULTANT'S NEGLIGENCE ACT, ERROR, OR OMISSION OF DESIGN CONSULTANT, ANY AGENT, OFFICER, DIRECTOR, REPRESENTATIVE, EMPLOYEE, CONSULTANT OR SUBCONSULTANT OF DESIGN CONSULTANT, AND THEIR RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, DIRECTORS AND REPRESENTATIVES while in the exercise of performance of the services, rights or duties under this AGREEMENT. The INDEMNITY provided for in this paragraph shall not apply to any liability resulting from the NEGLIGENCE of CITY, its officers or employees, in instances where such NEGLIGENCE causes personal injury, death, or property damage. IN THE EVENT DESIGN CONSULTANT AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.**

- 15.2 The DESIGN CONSULTANT shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or the DESIGN CONSULTANT, known to the Consultant, related to or arising out of the DESIGN CONSULTANT's activities under this Agreement.
- 15.3 The provisions of this section are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity.
- 15.4 Acceptance of the final plans by the CITY shall not constitute nor be deemed a release of the responsibility and liability of the DESIGN CONSULTANT, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, work drawings, Plans and Specifications or other documents and Work; nor shall such acceptance be deemed an assumption of responsibility or liability by the CITY for any defect in the designs, work drawings, Plans and Specifications or other documents and Work prepared by said DESIGN CONSULTANT, its employees, subconsultants, and agents.

ARTICLE XVI. CLAIMS AND DISPUTES

- 16.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of the Agreement terms, payment of money, extension of time or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between the Owner and DESIGN CONSULTANT arising out of or relating to the Agreement. Claims must be initiated by written notice. Every Claim of the DESIGN CONSULTANT, whether for additional compensation, additional time, or other relief shall be signed and sworn to by an authorized corporate officer (if not a corporation, then an official of the company authorized to bind the DESIGN CONSULTANT by his signature) of the DESIGN CONSULTANT, verifying the truth and accuracy of the Claim. The responsibility to substantiate Claims shall rest with the party making the Claim.
- 16.2 Time Limit on Claims. Claims by the DESIGN CONSULTANT or by the Owner must be initiated within 21 days after occurrence of the event giving rise to such Claim. Claims by the DESIGN CONSULTANT must be initiated by written notice to the Owner. Claims by the Owner must be initiated by written notice to the DESIGN CONSULTANT.
- 16.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing, the DESIGN CONSULTANT shall proceed diligently with performance of the Agreement and the Owner shall continue to make payments in accordance with the Agreement.
- 16.4 Claims for Additional Time. If the DESIGN CONSULTANT wishes to make Claim for an increase in the time for performance, written notice as provided in this Section 15 shall be given. The DESIGN CONSULTANT's Claim shall include an estimate of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.
- 16.5 Claims for Consequential Damages. Except as otherwise provided in this Agreement, in calculating the amount of any Claim or any measure of damages for breach of contract (such provision to survive any termination following such breach), the following standards will apply both to claims by the DESIGN CONSULTANT and to claims by the Owner:

16.5.1 No consequential damages will be allowed.

16.5.2 Damages are limited to extra costs specifically shown to have been directly caused by a proven wrong for which the other party is claimed to be responsible.

16.5.3 No profit will be allowed on any damage claim.

16.6 **Attorney's Fees.** IN ACCORDANCE WITH SECTION 271.159 OF THE TEXAS LOCAL GOVERNMENT CODE, AS AMENDED, THE DESIGN CONSULTANT SHALL NOT BE ENTITLED TO RECOVER ATTORNEY'S FEES OR CERTAIN DIRECT OR CONSEQUENTIAL DAMAGES AS A PART OF ANY CLAIM MADE UNDER THE AGREEMENT OR IN ANY SUBSEQUENT LAWSUIT OR ALTERNATIVE DISPUTE RESOLUTION PROCEEDING, AND DESIGN CONSULTANT HEREBY EXPRESSLY WAIVES SUCH CLAIMS.

16.7 **No Waiver of Governmental Immunity.** NOTHING IN THIS SECTION XVI SHALL BE CONSTRUED TO WAIVE THE OWNER'S GOVERNMENTAL IMMUNITY FROM LAWSUIT, WHICH IMMUNITY IS EXPRESSLY RETAINED TO THE EXTENT IT IS NOT CLEARLY AND UNAMBIGUOUSLY WAIVED BY STATE LAW.

16.8 Alternative Dispute Resolution.

16.8.1 Continuation of Work Pending Dispute Resolution. Each party is required to continue to perform its obligations under this Agreement pending final resolution of any dispute arising out of or relating to this Agreement unless it would be impossible or impracticable under the circumstances.

16.8.2 Requirement for Senior Level Negotiations. Before invoking mediation or any other alternative dispute process set forth herein the parties agree that they shall first try to resolve any dispute arising out of or related to this Agreement through discussions directly between those senior management representatives within their respective organizations who have overall managerial responsibility for similar projects. This step shall be a condition precedent to use of any other alternative dispute resolution process. If the parties' senior management representatives cannot resolve the dispute within thirty days after a party delivers a written notice of such dispute, then the parties shall proceed with mediation alternative dispute resolution process contained herein. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

16.8.3 Mediation.

16.8.3.1 In the event that the Owner or the DESIGN CONSULTANT shall contend that the other has committed a material breach of this Agreement, the party alleging such breach shall, as a condition precedent to filing any lawsuit, request mediation of the dispute.

16.8.3.2 Request for mediation shall be in writing, and shall request that the mediation commence not less than 30 or more than 90 days following the date of the request, except upon agreement of both parties.

16.8.3.3 In the event the Owner and the DESIGN CONSULTANT are unable to agree to a date for the mediation or to the identity of the mediator or mediators within 30 days following the date of the request for mediation, all conditions precedent in this article shall be deemed to have occurred.

16.8.3.4 The parties shall share the mediator's fee and any filing fees equally. Venue for any mediation or lawsuit arising under this Agreement shall be in Bexar County, Texas Any agreement reached in mediation shall

be enforceable as a settlement agreement in any court having jurisdiction thereof. No provision of this Agreement shall waive any immunity or defense. No provision of this Agreement is a consent to suit.

ARTICLE XVII. SEVERABILITY

- 17.1 If for any reason, any one or more paragraphs of this Agreement are held invalid or unenforceable, such invalidity or unenforceability shall not affect, impair or invalidate the remaining paragraphs of this Agreement but shall be confined in its effect to the specific section, sentences, clauses or parts of this Agreement held invalid or unenforceable, and the invalidity or unenforceability of any section, sentence, clause or parts of this Agreement in any one or more instance shall not affect or prejudice in any way the validity of this Agreement in any other instance.

ARTICLE XVIII. ESTIMATES OF COST

- 18.1 Since the DESIGN CONSULTANT has no control over the cost of labor, materials or equipment or over the CONSTRUCTION CONTRACTOR's methods of determining prices, or over competitive bidding or market conditions, DESIGN CONSULTANT's opinions of probable Project Cost or Construction Cost provided for herein are to be made on the basis of DESIGN CONSULTANT's experience and qualifications and represent DESIGN CONSULTANT'S best judgment as a design professional familiar with the construction industry but the DESIGN CONSULTANT cannot and does not guarantee that proposals, bids or the construction cost will not vary from opinions of probable Cost prepared by DESIGN CONSULTANT.

ARTICLE XIX. INTEREST IN CITY CONTRACTS PROHIBITED

- 19.1 No officer or employee of the CITY shall have a financial interest, directly or indirectly, in any contract with the CITY, or shall be financially interested, directly or indirectly, in the sale to the CITY of any land, materials, supplies or service, except on behalf of the CITY as an officer or employee. This prohibition extends to the City Public Service Board, the SAWS, and other CITY boards and commissions, which are more than purely advisory. The prohibition also applies to subcontracts on CITY projects.
- 19.2 The DESIGN CONSULTANT acknowledges that it is informed that the Charter of the CITY and its Ethics Code prohibit a CITY officer or employee, as those terms are defined in the Ethics Code, from having a financial interest in any contract with the CITY or any the CITY agency such as the CITY owned utilities. An officer or employee has a "prohibited financial interest" in a contract with the CITY or in the sale to the CITY of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a CITY officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns ten (10) percent or more of the voting stock or shares of the business entity, or ten (10) percent or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a CITY contract, a partner or a parent or subsidiary business entity.
- 19.3 The DESIGN CONSULTANT warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of the CITY. The DESIGN CONSULTANT further warrants and certifies that it has tendered to the CITY a Discretionary Contracts Disclosure Statement in compliance with the CITY's Ethics Code.

**ARTICLE XX.
CONFLICTS OF INTEREST DISCLOSURE**

- 20.1 All DESIGN CONSULTANT's must disclose if they are associated in any manner with a CITY Official or employee in a business venture or business dealings. Failure to do so will constitute a violation of the City Ordinance No. 76933. To be "associated" in a business venture or business dealings includes being in a partnership or joint venture with the officer or employee, having a contract with the officer or employee, being joint owners of a business, owning at least 10% of the stock in a corporation in which a CITY officer or employee also owns at least 10%, or having an established business relationship as client or customer.

**ARTICLE XXI.
STANDARD OF CARE/LICENSING**

- 21.1 Services provided by DESIGN CONSULTANT under this AGREEMENT will be performed in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.
- 21.2 The DESIGN CONSULTANT shall be represented by a registered professional Architect or Engineer licensed to practice in the State of Texas at meetings of any official nature concerning the Project, including but not limited to scope meetings, review meetings, pre-bid meetings, and preconstruction meetings, and other meetings as required by the project.
- 21.3 The Texas Board of Professional Architectural Examiners Hobby Building, 333 Guadalupe, Ste. 2-350, Austin, Texas 78701, (512) 305-9000 and/or Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741, (512) 4407723 has jurisdiction over individuals licensed under Title 22 of the Texas Administrative Code.
- 21.4 Acceptance of the final plans by CITY shall not constitute nor be deemed a release of the responsibility and liability of DESIGN CONSULTANT, its employees, associates, agents or subcontractors for the accuracy and competency of their designs, working drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by CITY for any defect in the designs, working drawings, specifications or other documents and work prepared by said DESIGN CONSULTANT, its employees, subcontractors, and agents.

**ARTICLE XXII.
RIGHT OF REVIEW AND AUDIT**

- 22.1 The Consultant grants the City, or its designees, the right to audit, examine or inspect, at the City's election, all of the Consultant's records relating to the performance of the Work under the Agreement during the term of the Agreement and retention period herein. The audit, examination or inspection may be performed by a City designee, which may include its internal auditors or an outside representative engaged by the City. The Consultant agrees to retain its records for a minimum of four (4) years following termination of the Agreement, unless there is an ongoing dispute under the contract, then, such retention period shall extend until final resolution of the dispute. "Consultant's records" include any and all information, materials and data of every kind and character generated as a result of the work under this Agreement. Example of Consultant records include but are not limited to billings, books, general ledger, cost ledgers, invoices, production sheets, documents, correspondence, meeting notes, subscriptions, agreements, purchase orders, leases, contracts, commitments, arrangements, notes, daily diaries, reports, drawings, receipts, vouchers, memoranda, time sheets, payroll records, policies, procedures, federal and state tax filings for issue in question, and any and all other agreements, sources of information and matters that may in the City's judgment have any bearing on or pertain to any matters, rights, duties or obligations under or covered by any Agreement Documents.

- 22.2 The City agrees that it will exercise the right to audit, examine or inspect only during regular business hours. The Consultant agrees to allow the City's designee access to all of the Consultant's Records, Consultant's facilities, and current or former employees of Consultant, deemed necessary by City or its designee(s), to perform such audit, inspection or examination. Consultant also agrees to provide adequate and appropriate work space necessary to City or its designees to conduct such audits, inspections or examinations.
- 22.3 Consultant must include this audit clause in any subcontractor, supplier or vendor contract.

ARTICLE XXIII. ENTIRE AGREEMENT

- 23.1 This Agreement represents the entire and integrated Agreement between the CITY and the DESIGN CONSULTANT and supersedes all prior negotiations, representations, or agreements, either oral or written. This Agreement may be amended only by written instrument signed by both the CITY and the DESIGN CONSULTANT.

ARTICLE XXIV. VENUE

- 24.1 The obligations of the parties to this Agreement shall be performable in San Antonio, Bexar County, Texas, and if legal action, such as civil litigation, is necessary in connection therewith, exclusive venue shall lie in Bexar County, Texas.

ARTICLE XXV. NOTICES

- 25.1 Except as may be provided elsewhere herein, all notices, communications, and reports required or permitted under this Contract shall be personally delivered or mailed to the respective party by depositing the same in the United States Postal Service addressed to the applicable address shown below, unless and until either party is otherwise notified in writing by the other party of a change of such address. Mailed notices shall be deemed communicated as of five days of mailing.

If intended for the CITY, to:

If intended for the DESIGN CONSULTANT, to:

Capital Improvements Management
Services Department
Attention: Debbie Sittre, Assistant
Director
114 West Commerce, 5th Floor
San Antonio, Texas 78205

ARTICLE XXVI. INDEPENDENT CONTRACTOR

- 26.1 In performing services under this Agreement, the relationship between the CITY and the DESIGN CONSULTANT is that of independent contractor. By the execution of this Agreement, the DESIGN CONSULTANT and the CITY do not change the independent contractor status of the DESIGN CONSULTANT. The DESIGN CONSULTANT shall exercise independent judgment in performing its duties and obligations under this Agreement and is solely responsible for setting working hours, scheduling or prioritizing the work flow and determining how the work is to be performed. No term or provision of this Agreement or act of the DESIGN CONSULTANT in the performance of this Agreement shall be construed as making the DESIGN CONSULTANT the agent, servant or employee of the CITY, or as making the DESIGN CONSULTANT or any of its agents

or employees eligible for any fringe benefits, such as retirement, insurance and worker's compensation, which the CITY provides to or for its employees.

ARTICLE XXVII. LEGAL CONSTRUCTION

- 27.1 If any term or provision of this Agreement may be held to be invalid, illegal, or unenforceable for any reason and in any respect, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement, and this Agreement shall be enforced as if such invalid, illegal, or unenforceable provision was not included in this Agreement.

ARTICLE XXVIV LEED SERVICES

28.1 The LEED Green Building Rating System or similar environmental guidelines ("LEED") utilizes certain design, construction and usage criteria in order to promote environmentally friendly building. The CITY acknowledges and understands that LEED is subject to interpretation, and achieving levels of compliance involves factors beyond the control of the DESIGN CONSULTANT, including, but not limited to, the CITY's use, operation and maintenance of the completed project. In addressing LEED, the DESIGN CONSULTANT shall perform its services in a manner consistent with that degree of skill and care ordinarily exercised by design professionals performing similar services in the same locality, and under the same or similar circumstances and conditions.

DESIGN CONSULTANT shall not be responsible for Contractor's failure to adhere to the Contract Documents and any applicable laws, codes and regulations incorporated therein, nor for any changes to the design made by the Owner without the direct participation and written approval of the DESIGN CONSULTANT. Likewise, the DESIGN CONSULTANT shall not be responsible for any environmental or energy issues arising out of the CITY's use and operation of the completed project.

The DESIGN CONSULTANT will use reasonable care consistent with the foregoing standard in interpreting LEED and designing in accordance with LEED. However, the DESIGN CONSULTANT does not warrant or represent that the Project will actually achieve LEED certification or realize any particular energy savings.

**ARTICLE XXVIII.
CAPTIONS**

29.1 The captions for the individual provisions of this Agreement are for informational purposes only and shall not be construed to effect or modify the substance of the terms and conditions of this Agreement to which any caption relates.

IN WITNESS WHEREOF, the City of San Antonio has lawfully caused these presents, to be executed by the hand of the City Manager, or designee, acting by the hand of NAME thereunto authorized TITLE; does now sign, execute and deliver this document.

Executed on this ____ day of _____, A. D. _____.

CITY OF SAN ANTONIO

**DESIGN CONSULTANT
FIRM NAME**

PENNY POSTOAK FERGUSON
ASSISTANT CITY MANAGER

NAME, TITLE

APPROVED:

CITY ATTORNEY

EXHIBIT 1
SCOPE OF SERVICES

EXHIBIT 2

COMPENSATION FOR ADDITIONAL PROFESSIONAL SERVICES

The Compensation as described in Article II and EXHIBIT I of this Agreement establishes the compensation to the DESIGN CONSULTANT for all services to be performed by DESIGN CONSULTANT or under its direction except the services as set forth below. These additional services and the compensation to be paid by the CITY to the DESIGN CONSULTANT for their performance when authorized in writing by the Director or his representative are set forth as follows:

- A. The basis for compensation for additional services may be in one or more of the following forms:
 - 1. \$100.00 per hour for testimony of principals.
 - 2. Direct salary cost times a multiplier of 2.5 with a stated maximum not to be exceeded, other than testimony of principals.
 - 3. Reimbursement of non-labor expense and subcontract expense at invoice cost plus a 15% service charge.
 - 4. Lump sum [to be negotiated]
 - 5. Lump sum per item of work [to be negotiated]
- B. Examples of additional services (not all inclusive).
 - 1. Assistance to the CITY as an expert witness in any litigation with third parties arising from the development or construction of the Project including the preparation of architectural and/or engineering data and reports.
 - 2. Preparation of plats and field notes for acquisition of property required for the construction of the project.
 - 3. Preparation of applications and supporting documents for Governmental grants, loans or advances in connection with the Project; Preparation or review of environmental assessment and impact statements; Review and evaluation of the effect on the design requirements of the Project of any such statements and documents prepared by others; and assistance in obtaining approval of authorities having jurisdiction over the anticipated environmental impact of the Project.
 - 4. Making revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given, are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents or are due to other causes not solely within the control of the DESIGN CONSULTANT.
 - 5. Providing detailed information of:
 - a. Owning, operation, maintenance and overhead costs of material and

equipment, or

- b. Quantity surveys of material, equipment and labor, or
 - c. Inventories of material and equipment, or
 - d. Investigations, surveys, valuations, inventories or detailed appraisals of facilities, construction and/or services not required by the Base Contract.
6. Cash flow and economic evaluations, rate schedules and appraisals.
7. Audit or inventories required in connection with construction performed by the CITY.
8. Services in making revisions to Drawings and Specifications occasioned by the acceptance of substitutions proposed by CONSTRUCTION CONTRACTOR(s); and services after the award of each contract in evaluating and determining the acceptability of an unreasonable or excessive number of substitutions proposed by CONSTRUCTION CONTRACTOR.
9. Services during out of town travel required of DESIGN CONSULTANT.
10. Additional services during construction made necessary by:
- a. Work damaged by fire or other cause during construction.
 - b. A significant amount of defective or neglected work of CONSTRUCTION CONTRACTOR(s).
 - c. Failure of performance of CONSTRUCTION CONTRACTOR(s).
 - d. Acceleration of the progress schedule required by the CITY involving services beyond normal working hours.
 - e. Default by CONSTRUCTION CONTRACTOR(s).
11. Providing extensive assistance in the utilization of any equipment or system such as initial start-up or testing, adjusting and balancing, preparation of operation and maintenance manuals, training personnel for operation and maintenance, and consultation during operation.
12. Providing services relative to future facilities, systems and equipment which are not intended to be constructed during the Construction Phase.
13. Services after completion of the construction phase, such as inspections during any guaranteed period and reporting observed discrepancies under guarantee called for in any contract for the Project.
14. Providing services of Geotechnical Engineering Firm to perform test borings and other soil or foundation investigations and related analysis.

15. Additional copies of contract documents, review documents, bidding documents, reports, drawings and specifications over the number specified in the Base Contract.
16. Preparation of all documents dealing with 404 permits, highway permits, and railroad agreements.
17. Preparation of driveway plats.
18. Providing photographs, renderings or models for CITY use.
19. Providing services of aerial mapping firm.
20. Providing services to investigate existing conditions or facilities or to make measured drawings thereof or to verify the accuracy of drawings or other information furnished by the CITY.
21. Providing services for exploration of utilities to include detailed measurements, surveys and verification of information provided by CITY and/or utility companies.
22. Preparing drawings, specifications and supporting data and providing other services in connection with Change Order Requests to the extent that the adjustment in the basic compensation resulting from the adjusted construction cost is not commensurate with the services required of the DESIGN CONSULTANT, provided such Change Order Requests are required by causes not solely within the control of the DESIGN CONSULTANT.
23. Providing other services not otherwise included in this Agreement which are not customarily furnished in accordance with generally accepted architectural and/or engineering practice.
24. Providing services of DESIGN CONSULTANT for other than the normal architectural, engineering, structural, mechanical, civil and electrical services for the Project.
25. Providing the services of material testing laboratory for detailed mill, shop and/or laboratory inspection of materials or equipment.

C. Fee Eligible

1. Fee eligible as it relates to Change Orders is defined as requiring significant architectural or engineering effort to compute and document the work effort reflected by the Change Order. Determination of "Fee Eligible" shall be made by the CITY Engineer.

D. Salary Cost

1. Salary cost is defined as the cost of salaries of architects, engineers, draftsmen,

stenographers, surveyors, clerks, laborers, etc. for time directly chargeable to the Project, plus customary and statutory benefits including but not limited to social security contributions, unemployment, excise and payroll taxes, employment compensation insurance, retirement benefits, medical and insurance benefits, sick leave, vacation and holiday pay applicable thereto.

E. Principals of the Consulting Firm

1. For the purpose of this provision, the Principals of the Consulting Firm and their total hourly charge will be as follows, except as stated previously for testimony as expert witnesses:

PRINCIPAL

\$_____ per hour

EXHIBIT 3

SBEDA DOCUMENTS